Supreme Court, U.S.
FILED
JUL 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-2130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

**ROBERT W. AKERS;
CALIFORNIA CATTLEMEN'S ASSOCIATION;
CALIFORNIA FARM BUREAU FEDERATION, and
NATIONAL CATTLEMEN'S ASSOCIATION**

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION AND BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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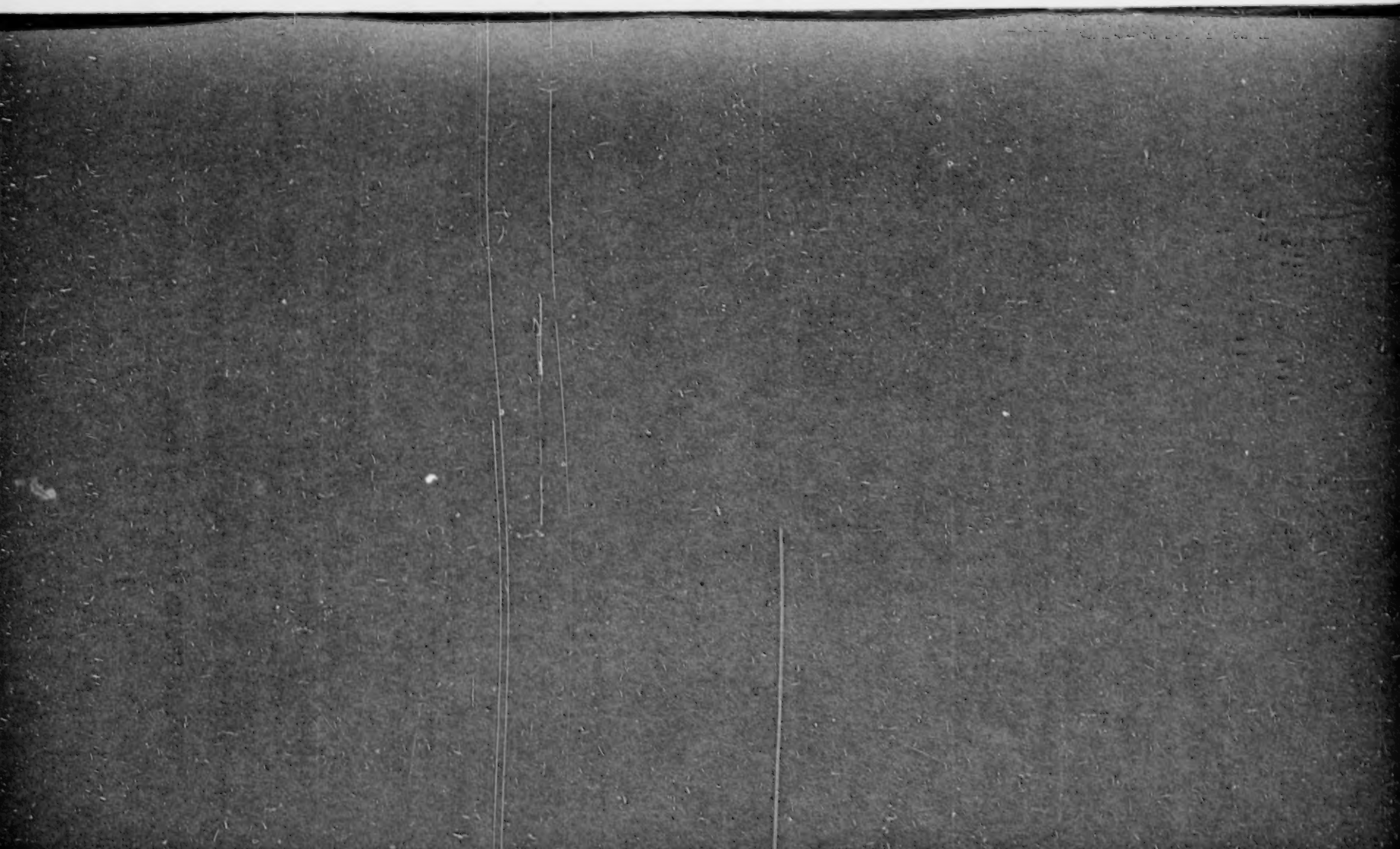

MOTION FOR LEAVE TO FILE AMICUS CURIAE

The American Farm Bureau Federation moves for leave to file a brief *amicus curiae* in the above case, pursuant to Supreme Court Rule 42. Consent has been requested of all parties, and has been obtained from Petitioners. No response to our request has yet been received from either the United States or intervenor-appellees.

The American Farm Bureau Federation of 225 Touhy Avenue, Park Ridge, Illinois is a general farm organization organized in 1919 under the "General Not-For-Profit Corporation Act" of the State of Illinois. It has as its purposes the protection, promotion and representation of the economic, social, business and educational interests of farmers and ranchers of the United States. The largest general farm organization in the world, it has member State Farm Bureaus in 49 states and Puerto Rico, representing the interests of more than 3 million member families.

Our interest in this case is the protection and preservation of the rights of farmers to make farm management decisions on their private lands without undue government interference. With today's depressed agricultural climate, it is especially important that farmers have the flexibility to make basic management decisions, such as what crops to plant, in response to market demands on the basis of what they determine will make best use of their private land and what will best support their families.

The decision below, involving interpretation of the authority of the Corps of Engineers under Section 404 of the Clean Water Act, seriously impairs this necessary freedom and flexibility with regard to crops grown on wetland areas. The decision allows the Corps to review all management decisions affecting wetlands crops, and gives the Corps authority to require a 404 permit where such practices could affect the "hydrological regime."

In 1977, Congress enacted provisions exempting "normal agricultural activities" from the Section 404 permitting

requirements. The decision below effectively negates this exemption in areas of wetland cropping, and could impose a substantial hardship on producers of such wetlands crops as rice, wild rice and cranberries.

In view of the issues and ramifications in this case, which are broader than the parties would indicate, the American Farm Bureau Federation respectfully requests that it be permitted to file a brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Section 404(f)(1), 33 U.S.C. § 1344(f)(1), provides an exemption from wetland dredge and fill regulation by the Army Corps of Engineers for agricultural activities. Section 404(f)(2), 33 U.S.C. § 1344(f)(2), makes the Section 404(f)(1) exemption inapplicable to certain practices. Does Section 404(f)(2) obviate the agricultural exemption when a farmer wishes to change from a wetland crop to an upland crop, or when a farmer wishes to rotate from one wetland crop to a different wetland crop and that change might alter an area's hydrological regime?

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BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation of 225 West Touhy Avenue, Park Ridge, Illinois is a general farm organization organized in 1919 under the "General Not-For-Profit Corporation Act" of the State of Illinois. It has as its purposes the promotion, protection and representation of the business, economic, social and educational interests of farmers and ranchers in the United States. It has member State Farm Bureau organizations in 49 states and Puerto Rico, representing the interests of more than three million member families.

A cornerstone of Farm Bureau philosophy expressed in policy adopted by voting delegates at the 1986 Annual Meeting in Atlanta, Georgia, states: "Property rights are among the human rights essential to the preservation of individual freedom." Our interest in this case is the protection of the right of a farmer or rancher to use his privately owned property in a manner that he determines will make best use of his land while at the same time provide a living for him and his family. Individual determination and flexibility are especially critical in today's depressed agricultural climate as farmers seek to adapt their farming operations in such ways to ensure their survival. All too often farmers have been forced to sit by helplessly as their survival is slowly strangled by excessive government regulation.

Section 404 of the federal Clean Water Act is one of the more restrictive government regulations, because it requires Army Corps of Engineers' approval for many proposed agricultural practices. In 1977, Congress struck a balance by exempting "normal agricultural practices" from Section 404 permit requirements. AFBF has participated in several subsequent cases in which courts have pretended that the agricultural exemption does not even exist. This trend is clearly contrary to the intent of Congress and detrimental to agriculture.

The Ninth Circuit decision below carries this trend one step farther by extending Corps of Engineers jurisdiction to wetland areas already producing crops. "Wetlands agriculture" is an expanding business, including such crops as rice (4.2 million acres nationwide), cranberries (23,820 acres nationwide), wild rice as well as meadow hay. Rice and cranberry operations are very capital intensive ventures, neither of which can afford to pay for more government regulation or risk that management decisions necessary to preserve their operations will be denied.

Every state has land classified as "wetlands," and therefore might potentially support a "wetlands agriculture." The 1982 SCS National Resources Inventory indicates that

there are 76,187,200 acres of "wetlands" throughout the United States (see Table I). The scope and viability of the Section 404 "agricultural exemption" is of nationwide significance and importance to our membership.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 785 F.2d 814 (9th Cir. 1986).

The opinion of the United States District Court for the Eastern District of California is not officially reported, but the court's findings of fact and conclusions of law and order granting preliminary injunction, filed January 15, 1985, are reproduced in Appendix C to petitioners' petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In the case below, *United States* v. *Akers*, 785 F.2d 814 (1986), the Ninth Circuit Court of Appeals found that if a farmer wishes to convert from a wetland crop to an upland crop (Opinion, Petitioners' Appendix Bat 10–11, all references to the Appendix refer to Petitioner's Appendices), or even if he merely wishes to convert from one wetland crop to another wetland crop, and management of the new wetland crop might possibly alter the "hydrologic regime," (Opinion, Appendix B at 11, 16-17), he must first obtain a permit pursuant to Section 404 of the Clear Water Act 33 U.S.C. § 1344.

As a result of this decision, most farming activities involving any change in the ongoing production of a particular wetland crop must first be reviewed and approved by the Army Corps of Engineers. (Even if a determination is made that the proposed activity will not alter the "hydrological regime" and therefore does not require a Section 404 permit, the proposed activity still must undergo COE scrutiny and

approval.) The activity at issue in this case, changing from one wetland crop (meadow hay) to another wetland crop (wild rice) involves a very basic "agricultural practice"—the decision as to which crop to plant. If the Ninth Circuit decision is permitted to stand, the Corps of Engineers will be given an unprecedented control over the course of wetlands agriculture, a result clearly not intended by Section 404.

A. Section 404 of the Clean Water Act Does Not Authorize the Corps of Engineers To Be Involved in the Daily Management Decisions of Farmers

The appellate decision below has accomplished the exact result that Congress sought to avoid in enacting Section 404 of the Federal Water Pollution Control Act of 1972, and the exact result thought to have been once and for all precluded by Section 404's clarifying modifications embodied in the Clean Water Act Amendments of 1977.

The Clean Water Act was designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one of the means of accomplishing this task the Act prohibits the discharge of dredged or fill materials into "navigable waters"—defined as waters of the United States—unless authorized by a permit issued by the Corps pursuant to Section 404. 33 U.S.C. §§ 1311, 1344. "Waters of the United States" have been interpreted to include "wetlands." 33 C.F.R. § 323.2(a). With this jurisdictional extension the Corps began to promulgate regulations controlling normal day-to-day agricultural activities which were occurring on farmlands that were classified by the Corps as "wetlands."

This created a serious backlash from agriculture which led to the 1977 amendments to Section 404 of the Clean Water Act. Senator Muskie explained the situation well:

> "The corps proceeded to take that section and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in

areas of the country which the corps had never imagined it had any jurisdiction over.

"We all began to get letters from farmers, foresters, ranchers, from people whose activities in the mind of Congress were not in the slightest bit intended to be affected by 404 when we enacted Section 404." A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Act (Leg. Hist.) Vol. 4 at 948 (Environmental Policy Division of the Congressional Research Service of the Library of Congress (October, 1978)) (Senate debate).

Several amendments to Section 404 were proposed, but of prominence were one supported by Senator Muskie of Maine (S. 1952, Section 49(e)(1)(A), Leg. Hist. at 623) and one sponsored by Senator Bentsen of Texas. Leg. Hist. at 901. Senator Bentsen argued that Section 404 should be limited to activities affecting navigable waters which could be used to transport interstate and foreign commerce thus excluding most farming from Section 404 regulation, the justification being that farming activities were never intended to be included by the 1972 Act in the first place. Senator Bentsen argued on behalf of his amendment:

"I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U.S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's inbox to another. I also find it offensive that a farmer who paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from his property." Leg. Hist. at 905.

Senator Muskie also found it offensive but opposed Mr. Bentsen's method of curing the Corps' overregulation of farmers. He stated:

> "I think it ought to be clear that no Member of the Senate . . . defends Section 404. The Senator [Bentsen] knows that I vigorously opposed the interpretation of Section 404 which the Corps of Engineers undertook to implement, and the committee undertook in its proposal to meet the objections of Section 404 in one way, and the Senator's amendment seeks to meet it in another way. So the contest is really not between those who defend Section 404 and those who object to it but rather it is a competition between two different methods of dealing with the problems created by the Corps' interpretation of Section 404." Leg. Hist. at 903.

There was no doubt that Congress was seeking to reduce the Corps' interpretation of its Section 404 jurisdiction to manageable limits, and to prevent the Corps from overseeing the day-to-day activities of America's farmers. However, the bill supported by Senator Muskie did not limit Section 404 jurisdiction to navigable waters as there was concern expressed by Senator Muskie and Hart, among others, that a large percentage of the nation's waters would be exempt from Section 404 regulation and could thereby be subject to unregulated toxic waste dumping. Leg. Hist. at 926 (Senate debate, Senator Hart), Leg. Hist. at 929, Senate debate, Senator Muskie). Of course this concern was unrelated to normal farming activities and as a result the bill which passed protected the farmer by exempting normal farming activities from Section 404 regulation.

Section 404(f) of the Clean Water Act, 33 U.S.C. § 1344(f) which contains the language championed by Senator Muskie, provides in relevant part:

> "(f)(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—
>
> > "(A) from normal farming, silvicultural, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
> >
> > . . . .
>
> "is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).
>
> "(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable water may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section."

Thus, Congress did not choose to limit the Section 404 jurisdiction of the Corps of Engineers over farmers by the type of water to be impacted, but instead chose specific exemption language which protected normal activities of farmers from Section 404 regulation. As stated by Senator Hart, the bill "does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers." Leg. Hist. 907–08 (Senate debate).

Senator Chafee speaking in support of the committee bill confirmed that the amended Section 404 would not regulate normal farming activities, which some senators feared:

> "That does not mean that if you are a farmer, you cannot plow your field. That is one of the red herrings

that has been raised in this bill. No one was watching over this more carefully than our distinguished presiding officer. [Muskie] He comes from farmland. He made sure that the farmers are protected under the bill, and they are.

"But what we are talking about is just indiscriminately filling in, and that is what the committee bill takes care of." Leg. Hist. at 919–20 (Senate debate) (emphasis added).

Normal wetlands farming activities such as crop rotations and extent and duration of irrigation activities do not entail the indiscriminate filling in of wetlands. Unfortunately, the Ninth Circuit Court of Appeals did not understand the Clean Water Act of 1977 to have this limitation and focus. To the contrary, by the court's decision, these farmers are not protected by Section 404(f)(1), to even plow their fields free of regulation, but instead their every activity is subject to regulation and control if such activity may have some impact on the underlying "hydrological regime." This result is clearly contrary to the intent of the Clean Water Act of 1977.

B. The Circuit Court's Narrow Interpretation of the Subsection (f)(2) Recapture Provisions Improperly Grants the Corps of Engineers Control Over Day-to-Day Farming Activities

Section 404(f)(2) limits the "normal farming" exemption to Section 404 to farming activities which *do not have the purpose of bringing the farmland into a use to which it was previously not subject* if the new use will alter the hydrological regime. (*See* Appendix A at 1–2 to petitioners' brief.) This Section 404(f)(2) "recapture provision" has been interpreted by the lower court to wipe out the subsection (f)(1) exemption if " 'a change within the farming use' " is proposed[1] which may change the farmland's hydrological regime. Appendix B at 16–17. One clearly unintended effect of this ruling is to

[1] A change from one wetland crop to another wetland crop or to an upland crop.

subjugate certain crucial management decisions of farmers, such as what crops to plant, to the vicissitudes of the Corps of Engineers rather than the urgencies of the market.

Another practical and unintended effect of the Court's interpretation is that farmers will be reluctant to convert from upland farming to wetland farming if they know that once the conversion is made their farming will be subject to Section 404 regulation. Thus even though current market conditions may dictate the creation of dikes and irrigation ditches needed to flood an area to cultivate wetland crop, and even though such an activity would help to create additional wetlands[2] which are of important ecological, biological, and environmental benefit, farmers simply will not convert for fear of long-term regulatory costs.

For example, the production of rice requires soils capable of holding water. Three to four acre feet of water must usually be pumped in during the growing season in addition to normal rainfall. The water is drained to permit harvest. These fields could possibly be declared man-made wetlands which could trigger Section 404 jurisdiction.

Because rice fields must be level, certain clearing operations are always required before planting. Also, good agricultural management practices recommend that an ideal crop rotation program for rice production is one year of rice and two years of soybeans (an upland crop).[3] The 1984 estimated rice acreage was 4.2 million acres, with a cash

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[2] Between the mid-1950s and mid-1970s farming activities artificially created over two million acres of wetlands. National Wetlands Inventory, Wetlands of the United States, Current Status and Recent Trends, United States Department of the Interior, Fish and Wildlife Service at 31 (March, 1984).

[3] Information on rice production set forth above is contained in DELTA AGRICULTURAL DIGEST 1986, Farm Press Publications, Inc., p. 134–5.

value of nearly $1 billion in 1984.[4] If the COE is permitted jurisdiction over rice fields as "man-made wetlands" and the principles of the decision below permits regulatory authority over crop rotation decisions, it will needless to say have several adverse impacts on the rice industry.

Application of the lower court decision will impact other wetlands crops as well. Wild rice, which appellant desires to plant, is a relatively new cash crop with high earning potential. Very little modification to existing fields is required to manage the crop. However, requiring a farmer to submit wild rice management proposals to COE before changing from one wetlands crop to wild rice, gives the Corps complete control over such routine farm decisions and activities.

CONCLUSION

If permitted to stand, the Ninth Circuit decision below will have profound effects on that segment of American agriculture that depends on wetlands. Rice (planted over 4.2 million acres with a cash value of $1 billion), wild rice (a cash crop with high return potential) and cranberries (23,820 acres planted with a value of $1.8 billion) are but a few of the wetlands crops which would be affected by allowing the Corps of Engineers to have Section 404 permit authority over normal farming decisions associated with these crops.

Congress never intended the Section 404 program to have such a profound economic impact on America's farmers. Nevertheless, as interpreted by the lower court, Section 404 will delegate to the Corps of Engineers the authority to make day-to-day management decisions upon which the farmers' economic existence may depend. American Farm Bureau Federation urges the Court to grant the Akers' petition for writ of certiorari so that the Clean Water Act of 1977 can be properly interpreted to protect this nation's farmers from the

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[4] *Rice, Background for 1985 Farm Legislation*, USDA, Agricultural Information Bulletin No. 470.

insidious usurpation by the federal bureaucracy of a farmer's right to make his own management decisions.

DATED: July 23, 1986

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TABLE I

WETLANDS IN THE UNITED STATES (EXCLUDING ALASKA)

Source: SCS 1982 National Resources Inventory

State	Total Acres	Wetlands with Medium or High Potential for Conversion to Cropland
Alabama	3,783,800	400,900
Arizona	134,900	23,500
Arkansas	1,323,400	121,500
California	1,380,500	102,400
Colorado	484,600	22,400
Connecticut	317,200	12,000
Delaware	236,800	83,700
Florida	7,727,500	535,400
Georgia	4,898,200	173,100
Hawaii	66,600	(not available)
Idaho	432,900	57,100
Illinois	822,600	103,400
Indiana	221,400	45,000
Iowa	125,800	27,300
Kansas	28,200	1,200
Kentucky	318,400	74,600
Louisiana	6,068,200	144,300
Maine	1,899,900	18,100
Maryland	935,700	68,200
Massachusetts	485,700	12,100
Michigan	3,960,800	224,600
Minnesota	7,723,200	393,900
Mississippi	2,839,600	279,100
Missouri	116,100	27,300
Montana	774,900	68,500
Nebraska	759,000	156,300
Nevada	82,300	6,900
New Hampshire	226,900	1,600
New Jersey	544,700	8,000
New Mexico	64,100	2,700
New York	2,298,000	170,800
North Carolina	2,874,000	278,100

TABLE I—(Cont.)

State	Total Acres	Wetlands with Medium or High Potential for Conversion to Cropland
North Dakota	2,896,100	298,200
Ohio	826,200	169,300
Oklahoma	140,500	22,500
Oregon	752,600	117,500
Pennsylvania	651,500	90,800
Puerto Rico	38,000	(not available)
Rhode Island	81,600	400
South Carolina	3,941,500	179,000
South Dakota	1,531,100	98,000
Tennessee	751,400	157,700
Texas	2,799,100	101,200
Utah	1,092,400	11,100
Vermont	182,800	3,100
Virginia	1,269,800	51,100
Washington	436,800	99,500
West Virginia	31,800	5,300
Wisconsin	4,494,800	122,600
Wyoming	263,300	12,400
TOTAL	76,187,200	5,184,300